82-935
No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES SENATE, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

The Federal Trade Commission Act authorizes the Commission to prescribe trade regulation rules which define unfair or deceptive acts or practices in or affecting commerce. Section 21(a) of the Federal Trade Commission Improvements Act of 1980 requires the Commission to submit any such rule to the Congress, and it provides that the rule shall become effective unless both Houses of Congress adopt a concurrent resolution disapproving it. Pursuant to this authority, both Houses in the 97th Congress adopted Senate Concurrent Resolution 60, which disapproved a trade regulation rule on the sale of used motor vehicles.

The question presented by this appeal is whether section 21(a) of the Federal Trade Commission Improvements Act of 1980 violates the procedures established in Article I of the Constitution for the enactment of legislation or violates the principle of separation of powers.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional And Statutory Provisions Involved	2
Statement	2
The Question Is Substantial	6
Conclusion	9
Opinion of Court of Appeals, filed October 22, 1982	1a
Order of District Court, filed June 29, 1982	7a
Plaintiffs' and Defendant Federal Trade Commission's Stipulation of Material Facts and Constitutional Question	9a
Memorandum Order of District Court, filed July 23, 1982.	13a
Judgment of Court of Appeals, filed October 22, 1982	21a
Notice of Appeal to the Supreme Court of the United States	23a
Senate Concurrent Resolution 60	24a
Constitutional Provisions Involved	24a
Statutory Provisions Involved	26a

TABLE OF AUTHORITIES

Cases:	
Buckley v. *Valeo*, 424 U.S. 1 (1976)	2
Chadha v. *Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980), *prob. juris. post. and cert. granted*, 454 U.S. 812 (1981), *restored to calendar for reargument*, 102 S. Ct. 3507 (1982)	6, 9
Consumer Energy Council of America v. *Federal Energy Regulatory Commission*, 673 F.2d 425, (D.C. Cir. 1982), *appeals docketed and petitions for cert. filed*, (Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209)	6, 7, 8, 9

Page

Statutes, Rules, and Regulations:
Federal Election Campaign Act Amendments of 1974, 2 U.S.C. 437h(b)(1976) 2
Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, Section 21, 94 Stat. 374, 393, 15 U.S.C. 57a-1 (Supp. IV 1980):
Section 21, 15 U.S.C. 57a-1 ..... 3, 4, 5, 6, 7
Section 21(c), 15 U.S.C. 57a-1(c) 4
Section 21(f), 15 U.S.C. 57a-1(f) 3, 4
Section 21(f)(2), 15 U.S.C. 57a-1(f)(2) 1, 2
Section 21(f)(3), 15 U.S.C. 57a-1(f)(3) 4
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1974)
15 U.S.C. 45(m) (1976) 8
15 U.S.C. 57a(1)(B) (Supp. IV 1980) 2
28 U.S.C. 1252 (1976) 2
46 Fed. Reg. 41328-78 (1981), *corrected, id.*, 43364-70 (1981) 3
Fed. R. Civ. P. 19 ..... 4, 5
Congressional Documents:
H.R. Rep. No. 586, 97th Cong., 2d Sess. (1982) 3
H.R. Rep. No. 917, 96th Cong., 2d Sess. (1980) 3, 7
124 Cong. Rec. 5012 (1978) 3
128 Cong. Rec. S5402 (daily ed. May 18, 1982) 3
128 Cong. Rec. H2883 (daily ed. May 26, 1982) 3
Federal Trade Commission Used Car Rule: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation, 97th Cong., 1st Sess. (1981) 3
Federal Trade Commission's Rule Regulating the Sale of Used Motor Vehicles: Hearings Before the Subcomm. on Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce, 97th Cong., 1st and 2d Sess. (1982) 3

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No.

UNITED STATES SENATE, APPELLANT

v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-5a) is not yet reported. The order of the district court certifying the constitutional question to the court of appeals (App. 7a-8a) is reported in 1982-2 Trade Cas. (CCH) ¶ 64,817. The memorandum order of the district court denying the motion of the United States Senate and House of Representatives for relief from the certification order (App. 13a-20a) is reported in 1982-2 Trade Cas. (CCH) ¶ 64,865.

JURISDICTION

The judgment of the court of appeals (App. 21a-22a) was entered on October 22, 1982. Section 21(f)(2) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. 57a-1(f)(2) (Supp. IV 1980), provides that an "appeal

[1] The other parties to the proceeding in the court of appeals were Consumers Union of U.S., Inc. and Public Citizen, Inc., the plaintiffs in this case, and the United States House of Representatives. The complaint named the Federal Trade Commission and the United States Senate and House of Representatives as defendants.

shall be brought not later than 20 days after the decision of the court of appeals." In accordance with that requirement, timely notices of appeal were filed by the United States Senate (App. 23a) and House of Representatives on November 4, 1982.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and section 21(f)(2) of the Federal Trade Commission Improvements Act of 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of Articles I, II, and III of the Constitution are set forth at App. 24a–26a. Section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. 57a–1 (Supp. IV 1980), and other relevant portions of the Federal Trade Commission Act, are set forth at App. 26a–33a.

STATEMENT

In 1974, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93–637, 88 Stat. 2183 (1974). Title II of the Act authorizes the Federal Trade Commission to prescribe trade regulation rules which define unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. 57a(1)(B) (Supp. IV 1980).

Between 1977 and 1980, the Congress debated the reauthorization of the Federal Trade Commission; this debate focused largely on the breadth of the Commission's rulemaking authority.[3] In the 96th Congress, the

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[2] This provision is identical to the provision for judicial review in the Federal Election Campaign Act Amendments of 1974, 2 U.S.C. 437h(b) (1976). The requirement that the "appeal shall be brought not later than 20 days after the decision of the court of appeals" was complied with in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), by the filing of notices of appeal in the court of appeals within twenty days of the judgment and the docketing of the appeals in this Court after the twenty-day period.

[3] Representative Broyhill explained that under the FTC's "very broad authorities to prohibit conduct which is 'unfair or deceptive' the FTC can regulate virtually every aspect of America's commercial

Continued

House passed a bill which provided for disapproval of Federal Trade Commission rules by the concurrent resolution of both Houses, or by a resolution of one House which is not disapproved by the other House. The Senate passed a bill which provided that Commission rules may be disapproved by joint resolutions adopted by both Houses and presented to the President for approval. A conference committee compromise resolved the three-year debate over reauthorization of the Federal Trade Commission by agreeing that "an FTC rule could be overturned only by adoption within 90 days of a concurrent resolution disapproving the rule." H.R. Rep. No. 917, 96th Cong., 2d Sess. 37 (1980) (conference report).

In August, 1981, the Commission submitted to the Congress pursuant to section 21 of the Federal Trade Commission Improvements Act of 1980 a final trade regulation rule on the sale of used motor vehicles. 46 Fed. Reg. 41328-78 (1981), *corrected, id.,* 43364-70 (1981). Senate and House committees held hearings on the rule,[4] and reported disapproval resolutions. H.R. Rep. No. 586, 97th Cong., 2d Sess. (1982). Following debate, the two Houses by recorded votes adopted Senate Concurrent Resolution 60, which disapproved the Commission rule (App. 24a). 128 Cong. Rec. S5402 (daily ed. May 18, 1982); *id.,* H2883 (daily ed. May 26, 1982).

The legislative review statute establishes a procedure for judicial review of the constitutionality of congressional disapproval of Commission rules. Section

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life. . . . The FTC's rules are not merely narrow interpretations of a tightly drawn statute; instead, they are broad policy pronouncements which Congress has an obligation to study and review." 124 Cong. Rec. 5012 (1978).

[4] *Federal Trade Commission Used Car Rule: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation,* 97th Cong., 1st Sess. (1981); *Federal Trade Commission's Rule Regulating the Sale of Used Motor Vehicles: Hearings Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce,* 97th Cong., 1st and 2d Sess. (1982).

21(f); 15 U.S.C. 57a-1(f). Under this procedure, any interested party may institute an action in the district court to construe the constitutionality of the statute. The district court is required immediately to certify all questions about the constitutionality of section 21 to the court of appeals, which is required to hear the matter en banc. Section 21(f) provides that any decision on a matter certified to the court of appeals is reviewable by appeal directly to the Supreme Court. It also provides that "[i]t shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified. . . ." Section 21(f)(3); 15 U.S.C. 57a-1(f)(3).

Pursuant to the statute, the Consumers Union of U.S., Inc. and Public Citizen, Inc. commenced an action on June 2, 1982, in the United States District Court for the District of Columbia. Their complaint requested a declaratory judgment that the statute and Senate Concurrent Resolution 60 are unconstitutional, and that "the Commission is obligated to make effective and implement the Used Car Rule." Complaint, p. 6. The Federal Trade Commission is named as a defendant in the complaint but has been aligned with the plaintiffs since the commencement of the litigation.[5] The complaint also named the United States Senate and House of Representatives as "part[ies] under Fed. R. Civ. P., Rule 19" on the theory

[5] In the court of appeals, the Brief for the Defendant Federal Trade Commission at 3 n. 2 explains:

> The Federal Trade Commission, in its capacity as an independent regulatory agency, has taken no position on the constitutionality of Section 21 of the FTC Improvements Act. Rather, in view of congressional disapproval of the Used-Car Rule, the Commission has taken the Rule under consideration, in accordance with Section 21(c) of the Act, and no effective date has been set for the rule. The Commission has deferred to the Department of Justice, as its counsel in this case, for the presentation of legal argument regarding the constitutionality of Section 21.

that the two Houses had an interest in the disapproval of the FTC rule and that the disposition of the case in their absence might impair their ability to protect that interest.[6]

The plaintiffs moved in the district court on June 25, 1982, to certify a constitutional question to the court of appeals. The plaintiffs supported their motion with a stipulation between the plaintiffs and the FTC which set forth the facts to which those parties had agreed. Prior to hearing from the Senate and House of Representatives, the district court entered an order on June 29, 1982, which certified to the court of appeals a three-part constitutional question and adopted the stipulation of facts of the plaintiffs and the Commission (App. 7a). The motion of the congressional defendants for relief from the ex parte order was denied by the district court for the reasons set forth in its memorandum order of July 23, 1982 (App. 13a). The court of appeals expedited the appeal and issued its opinion on October 22, 1982.

The court of appeals first resolved threshold questions which had been presented by the House of Representatives. The court decided that the plaintiffs have standing and that the case satisfies the adverse party requirement of Article III (App. 3a). It then held that the legislative review statute and Senate Concurrent Resolution 60 are unconstitutional. The court's complete discussion of the merits of the case was as follows:

> We are called upon then to decide whether Section 21(a) of the [Federal Trade Commission Im-

[6] The Senate's answer to the complaint denies the plaintiffs' allegation under Fed. R. Civ. P. 19. The Senate also noted in its brief in the court of appeals that the Congress had not waived the immunity of its Houses to suit. In previous cases on the constitutionality of legislative review the Senate has appeared initially as amicus curiae and has intervened after judgment in the courts of appeals for the purpose of petitioning this Court for review. To further the statutory objective of expedition, the Senate did not move to be dismissed but remained as a party in the court of appeals and presented a defense of the statute on the merits.

11-936 O - 82 - 2

provements Act of 1980] and Senate Concurrent Resolution 60(a) violate the principles of separation of powers established in Articles I, II, and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power.

We note that all three of these questions have been thoroughly considered and disposed of by a panel of this court in *Consumers Energy Council of America* v. *FERC*. We adhere to the analysis of that opinion. Accordingly, we hold:

1. For the reasons given in *Consumers Energy Council*, section V(E), Section 21(a) of the [Federal Trade Commission Improvements Act of 1980] and Senate Concurrent Resolution 60 violate the principles of separation of powers established in Articles I, II, and III of the Constitution.

2. For the reasons given in *Consumers Energy Council*, section V(D), Section 21(a) of the [Federal Trade Commission Improvements Act of 1980] and Senate Concurrent Resolution 60 violate the procedures established by Article I for the exercise of legislative powers.

3. For the reasons stated in *Consumers Energy Council*, section V, note 82, we decline to express an opinion as to whether Section 21(a) of the [Federal Trade Commission Improvements Act of 1980] and Senate Concurrent Resolution 60 improperly delegate administrative power to Congress without any standards for the exercise of that power.

For further proceedings in light of these holdings, the case is

Remanded.

(App. 4a-5a) (footnote omitted).

THE QUESTION IS SUBSTANTIAL

This Court has recognized the substantiality of the question of legislative review by granting certiorari in *Chadha* v. *Immigration and Naturalization Service*, 634 F. 2d 408 (9th Cir. 1980), *prob. juris. post. and cert. granted*, 454 U.S. 812 (1981), *restored to calendar for reargument*, 102 S.Ct. 3507 (1982). The decision of the District of

Columbia Circuit in the present case relies exclusively on the earlier decision of that court in *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F. 2d 425 (D.C. Cir. 1982). Four appeals, Nos. 81-2008, 81-2020, 81-2151, and 81-2171, and two petitions for writs of certiorari, Nos. 82-177 and 82-209, have been filed in that case. Like those pending cases, this appeal presents a fundamental question about the distribution of constitutional authority within the federal government. For the reasons presented in the pending cases and for the additional reasons which follow, this Court should give plenary consideration to this appeal.

1. There is no statutory impediment to a consideration of the merits of the legislative review provision in the Federal Trade Commission Improvements Act of 1980. In the Immigration and Nationality Act and Natural Gas Policy Act cases, we argue that the Court should not reach the merits of the constitutional question because the provisions for legislative review in those cases are inseverable from the delegation of authority to the officer or agency involved. In contrast, the provision for legislative review in the Federal Trade Commission Improvements Act is severable from the earlier delegation of authority to the Commission, *see* page 2 *supra*, to issue final trade regulation rules. The intention of the Congress that the provision for legislative review is severable is manifested by the expectation of the conferees on the Federal Trade Commission Improvements Act of 1980 that judicial review in this case "will result in a definitive Supreme Court decision on the question of constitutionality." H.R. Rep. No. 917, 96th Cong., 2d Sess. 38 (1980). There is no indication that the Congress intended to place the preexisting rulemaking authority of the Commission in jeopardy by obtaining a decision on constitutionality. The Court may reach the merits of the constitutionality of section 21(a) of the Federal Trade Commission Improvements Act because the provision for legislative review is severable.

2. In *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission, supra* page 7, the District of Columbia Circuit held that "[t]he primary basis of [its] holding is that the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto power and by permitting legislative action by only one house of Congress." (App., No. 81-2008, 37a). The legislative review provision of the Federal Trade Commission Improvements Act of 1980 provides for the disapproval of Commission rules by the concurrent resolution of both Houses. The disposition of this case by the District of Columbia Circuit on the basis of its ruling in the Natural Gas Policy Act case confirms that in fact "the primary basis" of the Circuit's rulings is its view of presidential power and not the requirement of bicameralism. This broad view of presidential power warrants review by this Court.

3. Trade regulation rulemaking by the independent Federal Trade Commission presents a special opportunity to examine the problem of the control of delegated authority. Many agencies have broad charters, but the Federal Trade Commission exercises an unusual degree of legislative discretion. It possesses an unparalleled latitude to decide what industries and practices to regulate, for the Congress has neither required it to make rules for all industries nor has restricted it to any particular industries. The Commission also possesses a unique power to change the balance between federal and state regulation because it has the discretion to bring under federal rules major industries, such as the used car industry, which had previously been left to state rules. The exercise of this power by the Commission has the further effect of assigning to the federal judiciary increased adjudicative responsibility for disputes over commercial practices because the Commission is authorized to bring civil actions in the district courts to impose civil penalties of $10,000 for each knowing violation of its rules. 15 U.S.C. 45(m)(1976). The Congress has determined that the pro-

posals of the Federal Trade Commission to bring new industries under federal regulation are policy judgments which the Congress should examine through the mechanism of legislative review. The constitutionality of this important legislative determination merits plenary review.[7]

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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M. ELIZABETH CULBRETH,
Deputy Senate Legal Counsel,
CHARLES TIEFER,
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Assistant Senate Legal Counsels.

December 1982.

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[7] Appellant has not moved to expedite this appeal because it recognizes that this Court's disposition of *Immigration and Naturalization Service* v. *Chadha* and consolidated cases, Nos. 80-1832, 80-2170, and 2171, may affect future proceedings in this appeal. If the Court grants plenary review of this appeal, we request that the Court also grant plenary review in *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission, supra* page 7, so that briefing and argument may proceed on the schedule of this appeal. The reason for this request is that the court of appeals in the present case relied exclusively on its earlier opinion in the Natural Gas Policy Act case. It would be illuminating to examine the reasoning of the court of appeals in the context of its full opinion on these issues.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1737

CONSUMERS UNION OF U.S., INC., ET AL., PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

Argued *en banc* 12 October 1982

Decided 22 October 1982

Before: ROBINSON, *Chief Judge;* WRIGHT, TAMM, MACKINNON, WILKEY, EDWARDS, GINSBURG and BORK, *Circuit Judges.*

Opinion Per Curiam.

PER CURIAM. This case involves three questions certified to us by the District Court pursuant to Section 21(f)(1) of the Federal Trade Commission Improvements Act of 1980 (FTCIA).[1] All three questions concern the constitutionality of Section 21(a) of that Act, which requires the Federal Trade Commission (FTC), after promulgating any final rule, to submit such rule to Congress for review. The rule becomes effective after ninety days of continuous session following submission unless both Houses of Congress adopt a concurrent resolution disapproving the final rule.

In August of 1981 the FTC, after several years of rulemaking proceedings, announced a final FTC rule covering

[1] 15 U.S.C. § 57a-1(a) (Supp. IV 1980).

representations of warranty coverage and disclosures of accurate information in connection with the sale of used cars.[2] The used car rule was submitted to each House of Congress on 9 September 1981.[3] Congress, by means of Senate Concurrent Resolution 60, proceeded to veto the rule.[4]

Following Congress' veto, plaintiffs, two consumer groups, filed this suit, naming as defendants the FTC, the Senate and the House of Representatives. The plaintiffs alleged that their members would be directly harmed by the legislative veto and the consequent failure of the FTC to make the used car rule effective. As required by the Act, the District Court immediately certified the constitutionality of the congressional action to this court for expeditious *en banc* consideration.

We are obliged at the outset to consider whether the matter before us meets the standing requirements of Article III. We hold that it does.

FTCIA authorizes "[a]ny interested party" to file an action challenging the statute's congressional veto provisions.[5] It is undisputed that Congress, through the "[a]ny interested party" specification, intended to permit standing to seek judicial review to the full extent permitted by Article III. One of the two plaintiff organizations, Consumers Union, participated in the FTC's used car rulemaking proceedings,[6] and both speak on behalf of consumers, in this instance, used car purchasers, who seek

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[2] 46 Fed. Reg. 41328–78 (1978).

[3] Because of the technicalities of the continuous session requirement, the rule was resubmitted on 28 January 1982.

[4] The Senate passed the veto resolution on 18 May 1982. 128 Cong. Rec. S5402 (daily ed.). The House of Representatives followed suit on 26 May 1982. 128 Cong. Rec. H2883 (daily ed.).

[5] 15 U.S.C. § 57a–1(f)(1) (Supp. IV 1980). *Cf.* 15 U.S.C. § 57a(e)(1)(A) (1976) ("any interested person (including a consumer or consumer organization)" may file a petition for judicial review of an FTC rule).

[6] *See* H. Conf. Rep. No. 917, 96th Cong., 2d Sess. 38 (1980) ("interested party" within the meaning of 15 U.S.C. § 57a–1(f)(1) includes, *inter alia*, "all persons who participated in the particular rulemaking that is the subject of the suit").

disclosures that would assist them in making informed purchasing decisions. Both organizations assert that, "but for" the veto's intervention, the FTC's used car rule would have secured significant assistance and protection for the used car buyers they represent.[7] Guided most clearly by the Supreme Court's decision in *Buckley v. Valeo*,[8] we conclude that the injury described in the consumer organizations' complaint satisfies the Article III threshold standing requirement.[9]

We further conclude that the case meets the Article III adversary contest requirement. The House and Senate, as named defendants, have vigorously aired their position on the constitutionality of the congressional veto, and have not sought dismissal of the complaint against them. The Resolution authorizing the Senate Legal Counsel to defend this case underscores the extraordinary character

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[7] *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72-78 (1978).

[8] 424 U.S. 1, 11-12, 109-43 (1976). In *Buckley*, under 2 U.S.C. § 437h (1976), a judicial review provision similar to 15 U.S.C. § 57a-1(f)(1), voters and candidates successfully challenged as inconsonant with the Appointments Clause statutory provisions concerning House and Senate appointment of members of the Federal Elections Commission. The "injury" supporting standing was less apparent in that case than in this one.

[9] Last term, in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 50 U.S.L.W. 4103, 4105 (1982), the Supreme Court explained that Article III requires, "at an irreducible minimum," that the claimed injury not only be sufficient in itself, but also sufficiently connected to plaintiff, to defendant's actions, and to the action requested of the court. That is, there must be injury in fact, a connection between the injury claimed and the plaintiff. Second, the injury must be fairly traceable to defendant's actions, a connection between the injury and defendant's actions. And third, there must be a likelihood that the injury will be redressed by a favorable decision, a connection between the injury and the action requested of the court. All three requirements are met here. Members of the two consumer organizations are handicapped in their efforts to make informed used car purchases by the lack of a disclosure rule. Congress' veto, and the FTC's decision to abide by it, prevented the used car rule from taking effect. Finally, this court's decision, that the veto was unconstitutional, will clear the way for the rule to become effective.

11-836 O - 82 - 3

of the proceeding.[10] As the Senate Resolution points out, "ordinarily [a chamber of Congress] may not be named as a party defendant in litigation." [11] In this exceptional situation, however, the Senate and House, in enacting 15 U.S.C. § 57a-1(f)(1), and participating here as parties, have supplied the requisite adverseness and have effectively invited our expeditious resolution of the constitutional questions at issue.[12]

We are called upon then to decide whether Section 21(a) of FTCIA and Senate Concurrent Resolution 60 (a) violate the principles of separation of powers established in Articles I, II, and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power.

We note that all three of these questions have been thoroughly considered and disposed of by a panel of this court in *Consumers Energy Council of America v. FERC.*[13] We adhere to the analysis of that opinion. Accordingly, we hold:

> 1. For the reasons given in *Consumers Energy Council,* section V(E), Section 21(a) of the FTCIA and Senate Concurrent Resolution 60 violate the principles of separation of powers established in Articles I, II, and III of the Constitution.
>
> 2. For the reasons given in *Consumers Energy Council,* section V(D), Section 21(a) of the FTCIA and Senate Concurrent Resolution 60 violate the procedures established by Article I for the exercise of legislative powers.

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[10] S. Res. 421, 97th Cong., 2d Sess. (1982), *adopted,* 128 Cong. Rec. S7613 (daily ed. 29 June 1982).

[11] *Id.*

[12] *Cf. Chadha v. Immigration and Naturalization Service,* 634 F.2d 408, 419-20 (9th Cir. 1980), *restored to calendar for reargument,* —— S.Ct. —— (1982).

[13] 673 F.2d 425 (D.C. Cir. 1982), *appeal docketed,* 51 U.S.L.W. 3099 (U.S. 2 Aug. 1982) (No. 82-177).

3. For the reasons stated in *Consumers Energy Council,* section V, note 82, we decline to express an opinion as to whether Section 21(a) of the FTCIA and Senate Concurrent Resolution 60 improperly delegate administrative power to Congress without any standards for the exercise of that power.

For further proceedings in light of these holdings, the case is

Remanded.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF U.S., INC., and PUBLIC CITIZEN, INC., PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

Filed, June 29, 1982

(Civil Action No. 82-1512)

ORDER

Whereas this action was instituted by Consumers Union of U.S., Inc. and Public Citizen, Inc. to challenge the constitutionality of Section 21(a) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. Section 57a-1(a), and the legislative veto of the Used Car Rule contained in Senate Resolution 60,

Whereas the FTC Improvements Act of 1980, 15 U.S.C. Section 57a-1(f)(1), provides that in cases brought to construe the constitutionality of the Act, the district court immediately shall certify all questions of the constitutionality of the Act to the United States Court of Appeals for the circuit involved,

Therefore, upon consideration of the motion of plaintiffs for certification of the constitutional question to the Court of Appeals, the response of defendants and the entire record herein, it is by this Court this 28th day of June 1982,

ORDERED and ADJUDGED that plaintiffs' motion is hereby granted; and it is

FURTHER ORDERED AND ADJUDGED that the material facts are set forth in Plaintiffs' and Defendant Federal Trade Commission's Stipulation of Material Facts and Constitutional Question.

FURTHER ORDERED and ADJUDGED that the following question regarding the constitutionality of Section 21(a) of the Federal Trade Commission Act of 1980, 15 U.S.C. Section 57a-1(a), is hereby immediately certified to the United States Court of Appeals for the District of Columbia for a ruling *en banc*, pursuant to Section 21(f)(1) of that Act, 15 U.S.C. Section 57a-1(f)(1):

> Whether Section 21(a) of the Federal Trade Commission Improvements Act, 15 U.S.C. Section 57a-1(a) and Senate Concurrent Resolution 60, which was approved by the Senate and House of Representatives, (a) violate the principles of separation of powers established in Articles I, II, and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power?

It is FURTHER ORDERED and ADJUDGED that the Clerk of this Court shall as soon as practicable transmit the entire record of the instant case to the Clerk of the Court of Appeals for this Circuit.

/s/ JOHN GARRETT PENN,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF U.S., INC., and PUBLIC CITIZEN, INC., PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

(Civil Action No. 82-1512)

PLAINTIFFS' AND DEFENDANT FEDERAL TRADE COMMISSION'S STIPULATION OF MATERIAL FACTS AND CONSTITUTIONAL QUESTION

Plaintiffs Consumers Union and Public Citizen and Defendant Federal Trade Commission hereby stipulate that the following facts are the sole facts, other than matters of public record, that are material to this case:

1. Defendant Federal Trade Commission (the "Commission" or "FTC") is an agency of the United States.

2. On August 18, 1981, pursuant to its authorities under Section 18 of the Federal Trade Commission Act, 15 U.S.C. Section 57a, and Section 109(b) of the Magnuson-Moss Warranty Act, 15 U.S.C. Section 2309(b), the FTC promulgated a trade regulation rule concerning the sale of used motor vehicles (the "Used Car Rule" or "Rule"). 46 Fed. Reg. 41330 (August 14, 1981). The Used Car Rule requires dealers to post a window sticker on used cars offered for sale to consumers describing: (1) certain major mechanical defects known to the dealer, (2) whether the dealer offers any warranties on the car, and (3) the nature of any such warranties. The text of the rule, a

chronology of the rulemaking proceedings, the Commission's statement of basis and purpose for the Rule, and the Commission's regulatory analysis of the Rule are set forth at 46 Fed. Reg. 41328 (August 14, 1981) and corrections thereto are set forth at 46 Fed. Reg. 43364 (August 27, 1981). Copies of these documents are appended.*

3. The FTC, on examining the rulemaking record supporting the Rule, concluded that consumers are frequently misled or deceived by auto dealers' affirmative misrepresentations and failures to disclose material facts concerning both the extent of warranty coverage offered by used car dealers and the mechanical condition of used cars at the time of sale. 46 Fed. Reg. 41331. The FTC issued the Rule to prevent the above-mentioned deceptive practices in the used car industry. In issuing its rule, the Commission announced its intention that the rule become effective six months after the conclusion of the congressional review provided for in Section 21 of the FTC Improvements Act of 1980, 15 U.S.C. Section 57a-1. The Commission stated that it would publish a notice of effective date as soon as possible at the conclusion of said congressional review. 46 Fed. Reg. 41328. On April 5, 1982, the Commission modified its position to indicate its intention to establish an effective date for the rule eight months after completion of congressional review.

4. On May 18, 1982, and May 26, 1982, in accordance with Section 21(a) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. Section 57a-1(a), the Senate and the House respectively approved Senate Concurrent Resolution 60, which vetoed the Used Car Rule.

5. As a result of the veto of the Used Car Rule, the FTC has not set an effective date for the rule as it has an-

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* Appellant's note:

The plaintiffs and the defendant Federal Trade Commission had appended to their stipulation the rule and the Commission's statement of basis and purpose for the rule. These documents are printed at 46 Fed. Reg. 41328-78, and 46 Fed. Reg. 43364-67. Owing to their length, they are not reprinted in the appendix to this jurisdictional statement but will be reprinted in the joint appendix if plenary review is granted.

nounced it would in its Federal Register Notice of August 14, 1981. Instead the Commission has taken the rule under consideration in accordance with Section 21(c) of the FTC Improvements Act of 1980, 15 U.S.C. Section 57a-1(c). 47 Fed. Reg. 24542 (June 7, 1982).

6. Consumers Union of U.S., Inc. ("Consumers Union" or "CU") is a nonprofit membership corporation chartered in 1936 and existing under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. It publishes *Consumer Reports*, a magazine with a circulation of approximately 3 million, which regularly carries articles on automobiles to assist CU members in purchasing used and new cars. Consumers Union represents the interests of its approximately 400,000 members in federal rulemaking proceedings and in litigation before the courts. It participated in the FTC's Used Car Rule proceedings which are the subject of this action and urged the Commission to adopt an earlier proposed version of the Rule with minor amendments. Plaintiffs allege in their complaint that the Rule would benefit CU members, who have bought and who can be expected to buy used cars from dealers in the future, by requiring dealers to disclose known mechanical defects and dealer warranties. Plaintiffs also allege in the complaint that Consumers Union's members are and will be adversely affected by the Congressional veto and by the Commission's failure to make effective and implement the Rule as a result of that veto.

7. Public Citizen, Inc. is a non-profit organization supported by the contributions of approximately 40,000 individuals each year. It engages in a wide variety of activities with a particular focus on protecting and augmenting the rights of consumers. Plaintiffs allege in the complaint that the FTC's Used Car Rule which was vetoed would have benefited Public Citizen's supporters and its nearly 50 employees, many of whom can be expected to purchase

used cars in the future, by requiring dealers to disclose known mechanical defects and dealer warranties.

CONSTITUTIONAL QUESTION

Plaintiffs Consumers Union and Public Citizens and defendant Federal Trade Commission hereby stipulate that the following constitutional question is raised in this case:

Whether Section 21(a) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. Section 57a-1(a), and Senate Concurrent Resolution 60, which was approved by the Senate and House of Representatives, (a) violate the principles of separation of powers established in Articles I, II, and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power?

/s/ BROOK HEDGE,
/s/ MARK C. RUTZICK,
Attorneys for Defendant,
Federal Trade Commission.

/s/ ELLEN BROADMAN,
ALAN MARK SILBERGELD,
ROBERT W. NICHOLS,
ALAN B. MORRISON,
Attorneys for Plaintiffs.

Dated: June 25, 1982.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF U.S., INC., and PUBLIC CITIZEN, INC., PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, UNITED STATES SENATE, and UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS

Filed, July 23, 1982

(Civil Action No. 82-1512)

MEMORANDUM ORDER

The plaintiffs, Consumers Union of U.S., Inc., and Public Citizen, Inc., filed this action on June 2, 1982, in which they seek to have the Court declare "that Section 21(a) of the Federal Trade Commission Improvement Act of 1980, 15 U.S.C. § 57a-1(a), and the congressional veto of the Used Car Rule (Senate Concurrent Resolution 60) are unconstitutional and hence null and void." Named as defendants are the Federal Trade Commission (FTC), the United States Senate (Senate) and the United States House of Representatives (House).

I.

On June 25, 1982, the plaintiffs filed a motion for certification of the constitutional question to the United States Court of Appeals for a ruling en banc. 15 U.S.C. § 57a-1(f)(1) provides that any interested party may institute an action to construe the constitutionality of any provision of the Federal Trade Commission Improvements Act of 1980 and that "[t]he district court immediately

shall certify all questions of constitutionality . . . to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." Attached to the motion was a "stipulation of material facts and constitutional question" entered into by the plaintiffs and the FTC. The Senate and the House did not join in the stipulation and had not responded as of that date. The Court, pursuant to the statute, signed the order certifying the constitutional question to the court of appeals on June 28, 1982. That order was filed the following day.

On July 8, 1982, the Senate and the House filed a motion for relief from the order certifying the case to the court of appeals. These two defendants complained that they had until July 8, 1982, to respond to plaintiffs motion and that the case should not have been certified prior to that date. They argued that the function of the district court is to make findings of facts with reference to the constitutional issues presented in the complaint and to identify the constitutional issues. Basically, both the Senate and the House believe the "questions should be certified as they were framed in the complaint." Senate-House motion at 5. Moreover, the House would seek certification of an additional question, namely, whether the action presents a justiciable case or controversy under Article III of the Constitution.

The Senate and the House seek to have the Court transmit an order to the Court of Appeals "requesting that the order of June 29, 1982, be vacated and the case remanded to permit the Senate and the House to be heard on the facts which should be found and the constitutional question which should be certified to the court of appeals."

On July 13, 1982, the Court heard the Senate-House motion. The plaintiffs and the FTC vigorously oppose any request for remand because, as they advised the Court, they have requested an expedited schedule for briefs and oral arguments before the court of appeals. If their suggestions are followed by that court, opening briefs for the

plaintiffs and the FTC will be due on July 30, 1982. They also contend the remand is unnecessary and would defeat the intent of Congress that the proceedings be expedited to the greatest extent possible. Finally, they contend that the Senate and the House have failed to identify "a single fact" not included in the stipulation of material facts already certified to the court of appeals.

At the conclusion of the hearing, the Court directed the Senate and the House to file their proposed findings of fact. This was done to allow those two defendants to clearly establish for the record that there are genuine issues of material fact or, that there is a need for the Court to make additional findings of fact. They were to file their proposed findings of facts together with any relevant exhibits, and the constitutional questions they proposed for certification on or before July 15, 1982. Once filed, the Court advised the parties that it might schedule a further hearing on July 16th. On July 15 the Senate and the House filed a supplemental memorandum to their motion for relief and also filed proposed findings of material facts and two proposed constitutional questions. After reviewing these submissions, the Court scheduled a hearing for the afternoon of July 16, 1982.

During the hearing on July 16, it became apparent that the "factual" issues referred to by the Senate and the House were really "legislative facts" in the sense that the facts were part of the legislative, administrative, and rulemaking history that can be readily gleaned from the exhibits submitted by the Senate and the House. The "factual issues" appear to amount to no more than the characterization one might give to statements contained in the exhibits. There are no true issues of material facts. This Court sees little difference between the "factual" issues the Senate and the House allege exist in the case and the references one might make to the legislative history of a statute including committee reports, comments by committee members or debates on the floor of the Senate or the House. While persons may give different in-

terpretations or characterizations to the same language, such interpretations or characterizations do not amount to true factual issues in the context of this case. Additionally, if and when this case is argued before the court of appeals, each judge will no doubt rely upon his or her reading of the documents and the related legislative and administrative history rather than to rely upon this Court's interpretation.

Nevertheless, the Court required the plaintiffs and the FTC to respond to the proposed findings of facts filed by the Senate and the House and those submissions were filed on July 19, 1982. As anticipated, the response of the plaintiffs and the FTC serve only to demonstrate that there are no true factual issues; rather, there is a debate over characterization of the FTC rulemaking record. Finally, the Senate and the House were afforded time to respond to the July 19th submission by the plaintiffs and the FTC and they filed their response on July 20, 1982.

During the course of arguments on July 16, counsel for the Senate and House advised the Court that the only constitutional question that they would seek to certify is the one now set forth in their statement of constitutional questions concerning the constitutionality of the subject statute. In addition, the House would certify one additional question concerning the justiciability issue. All parties have advised the Court that the documents now before the Court constitute the complete record in the case.

II.

There is no question but that neither the Senate nor the House responded to the plaintiffs' motion to certify prior to the Court's order of June 28, 1982. Thus, up to that point, they had not been heard on the question of any factual issues or the constitutional question to be certified. Although 15 U.S.C. § 57a-1(f)(1) provides that the district court shall "immediately" certify all questions of constitutionality to the court of appeals, that language has not been interpreted to mean that certification will take place as soon as a complaint is filed; rather, the par-

ties shall have an opportunity to pose the question and identify any facts relevant to the consideration of the question after which the district court shall make any necessary findings of material fact and certify the constitutional question. See *Buckley* v. *Valeo,* 171 U.S. App. D.C. 168; 519 F.2d 817 (1975). This means that the Senate and the House should properly have been heard prior to certification. Thus, the Court concludes that the order of June 28, 1982, was premature even though the statute requires expedited action.

Therefore, it appears that the motion for relief filed by the Senate and the House should be granted if such action is necessary to ensure them an opportunity to present their views or obtain certification of a constitutional question not already certified to the court of appeals. Obviously, keeping in mind the requirement that action be expedited, if the Senate and the House had announced that they were satisfied with the certification of fact and the constitutional question, it would be a useless act to seek remand since any error in the premature certification would be harmless and not prejudicial. Moreover, and perhaps most important, a remand under such circumstances would not be helpful to the court of appeals.

Here, the Senate and the House purport to disagree with the questions certified and contend that the Court should make additional findings of fact. As to the findings of facts, it is unnecessary for the Court to seek a remand because there are no additional facts to be certified since this case really presents no material factual issues other than those stipulated by the plaintiffs and the FTC. Significantly, neither the Senate nor the House dispute those facts. As for the additional "facts" included in the Senate-House findings of facts, they appear to be no more than characterizations of the record upon which the parties may disagree; but, they are not true material facts necessary for the determination of the constitutional question posed to the court of appeals. All parties are free

to argue from the record and the court of appeals may rely on these exhibits, which actually constitute the legislative, administrative and rulemaking history, without regard to this Court's characterization of that history. In short, it does not appear that the acts of this Court in commenting on, for example, The Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rules (16 CFR 455), Senate-House Exhibit K, will be of any assistance to the court of appeals or to the Supreme Court if the case reaches that level. Accordingly, this Court sees no need to add to or amplify the facts already set forth and adopted in its certification order dated June 28, 1982. In other words, had the Senate and the House answered before June 28 and the parties presented the same arguments, the Court would have concluded that the facts already certified are the only facts necessary for the court of appeals determination of the constitutionality of the statute. The exhibits attached to the Senate-House findings of facts are important and all parties agree to their authenticity. Since the parties agree to the authenticity of the documents the record before the court of appeals can be supplemented. It must be kept in mind that the only relevant facts are those material to the constitutional issue.

As to the certification of the constitutional question, the Court finds little difference on the question already certified and that which the Senate and the House propose to certify. Indeed, the plaintiffs and the FTC have no objection to certification of the Senate-House question. The questions pose the same issue and this court sees no reason to seek remand in this proceeding for that purpose. Likewise, the Court concludes that there is no reason to seek remand to pose the second question concerning whether the matter presents a case or controversy. That issue goes to the jurisdiction of the Court to entertain the case and a court may always question its jurisdiction. Jurisdiction is an issue presented in every case brought in a federal court. Finally, the Court need not

certify that question to the court of appeals since that question does not address the constitutionality of the statute itself. *See* 15 U.S.C. § 57a-1(f)(1).

The Senate and the House rely on *Buckley* v. *Valeo, supra,* in support of their motion but the issues in that case were different. First, apparently the trial court had not posed the constitutional question. *See* 171 U.S. App. D.C. at 172, 519 F. 2d at 821 (Bazelon, C.J., dissenting). Second, it appears that there were true factual issues in the case.

In sum, although the Court concludes that its certification order was premature in that the Senate and the House did not have an opportunity to respond to the motion prior to certification; having now heard the response of those two defendants, the Court concludes that the same question and the same facts would have been certified. While additional facts could have been certified, those facts are not material to the resolution of the single constitutional question certified by the Court. Having in mind the requirement that the Court "immediately" certify the case where the constitutionality of the statute is in question, and recognizing that the Senate and the House have not been prejudiced by the premature certification in that they have had a full opportunity to develop their record in the present proceedings before this Court, and that further findings of fact will not aid or assist the framing of the question or the court of appeals, the Court concludes that the motion should be denied.

ORDER

It is hereby

ORDERED that the motion of the United States Senate and the United States House of Representatives for relief from the Order of June 29, 1982, is denied, and it is further

ORDERED that the submission and exhibits filed by the parties in support of and in opposition to the motion are made a part of the record in this case so that the par-

ties may designate those parts of the record as the record on appeal.

/s/ JOHN GARRETT PENN,
United States District Judge.

Dated: July 23, 1982.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-1737

CONSUMERS UNION OF U.S., INC., ET AL., PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

Appeal From the United States District Court for the District of Columbia

(Civil Action No. 82-01512)

Before: ROBINSON, *Chief Judge;* WRIGHT, TAMM, MACKINNON, WILKEY, EDWARDS, GINSBURG and BORK, *Circuit Judges*

JUDGMENT

This cause came on to be heard on three questions certified to this Court by the United States District Court for the District of Columbia pursuant to Section 21(f)(1) of the Federal Trade Commission Improvements Act of 1980, and was argued by counsel before the Court sitting *en banc.* On consideration of the foregoing, and this Court having answered the questions certified in the Opinion for the Court, filed herein this date, it is

ORDERED and ADJUDGED, by this Court, *en banc,* that the case is remanded to the District Court for fur-

ther proceedings consistent with the Opinion for the Court, filed herein this date.

Per Curiam For the Court,

/s/ GEORGE A. FISHER,
Clerk.

Date: October 22, 1982.

Opinion Per Curiam.

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1737

CONSUMERS UNION OF U.S., INC., and PUBLIC CITIZEN, INC., PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, UNITED STATES SENATE, and UNITED STATES HOUSE OF REPRESENTATIVES, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States Senate hereby appeals to the Supreme Court of the United States from the judgment entered in this case on October 22, 1982, holding unconstitutional section 21(a) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a-1(a) (Supp. IV), and Senate Concurrent Resolution 60 of the 97th Congress.

This appeal is taken pursuant to 28 U.S.C. § 1252 (1976) and 15 U.S.C. § 57a-1(f)(2) (Supp. IV 1980).

Respectfully submitted,

/s/ MICHAEL DAVIDSON,
Senate Legal Counsel,
1413 Dirksen Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435
Counsel for the United States Senate.

Dated: November 4, 1982.

SENATE CONCURRENT RESOLUTION 60

97th Congress, 2d Session

Disapproving the Federal Trade Commission trade regulation rule relating to the sale of used motor vehicles.

Resolved by the Senate (the House of Representatives concurring), That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of the trade regulation rule relating to the sale of used motor vehicles, which final rule was submitted to the Congress on January 28, 1982.

CONSTITUTIONAL PROVISIONS INVOLVED:

1. Article I, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 7, Clauses 2 and 3, of the United States Constitution provide:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be re-

turned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

3. Article I, Section 8, of the United States Constitution provides in pertinent part:

The Congress shall have Power * * *

* * * * *

To regulate Commerce with foreign nations, and among the several states, * * *

* * * * *

—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. Article II, Section 1, of the United States Constitution provides in pertinent part:

The executive Power shall be vested in a President of the United States of America.

5. Article II, Section 3, of the United States Constitution provides in pertinent part:

* * * he shall take Care that the Laws be faithfully executed,* * *.

6. Article III, Section 1, of the United States Constitution provides in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III, Section 2, of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *—to Controversies to which the United States shall be a Party; * * *

STATUTORY PROVISIONS INVOLVED:

(1) 15 U.S.C. 45 (1976) provides in pertinent part:

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) 15 U.S.C. 57a (Supp. IV 1980) provides in pertinent part:

§ 57a. Unfair or deceptive acts or practices rulemaking proceedings—Authority of Commission to prescribe rules and general statements of policy

(a)(1) Except as provided in subsection (i) of this section, the Commission may prescribe—

* * * * *

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may in-

clude requirements prescribed for the purpose of preventing such acts or practices.

(3) Section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. 57a-1 (Supp. IV 1980), provides:

§ 57a-1. Congressional review of rules—Promulgation of final rule by Federal Trade Commission; submittal to Congress; effective date

(a)(1) The Federal Trade Commission, after promulgating a final rule, shall submit such final rule to the Congress for review in accordance with this section. Such final rule shall be delivered to each House of the Congress on the same date and to each House of the Congress while it is in session. Such final rule shall be referred to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House, respectively.

(2) Any such final rule shall become effective in accordance with its terms unless, before the end of the period of 90 calendar days of continuous session after the date such final rule is submitted to the Congress, both Houses of the Congress adopt a concurrent resolution disapproving such final rule.

Congressional authority; disapproval of final rule by concurrent resolution; motion to discharge; appeals; approval of concurrent resolution

(b)(1) The provisions of this subsection are enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rule of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of concurrent resolutions which are subject to this section, and such provisions supersede other rules only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(2)(A) Any concurrent resolution disapproving a final rule of the Commission shall, upon introduction or receipt from the other House of the Congress, be referred immediately by the presiding officer of such House to the Committee on Commerce, Science, and Transportation of the Senate or to the Committee on Energy and Commerce of the House, as the case may be.

(B) If a committee to which a concurrent resolution is referred does not report such concurrent resolution before the end of the period of 75 calendar days of continuous session of the Congress after the referral of such resolution to the Committee on Commerce, Science, and Transportation of the Senate or to the Committee on Energy and Commerce of the House, as the case may be, under subsection (a)(1) of this section, it shall be in order to move to discharge any such committee from further consideration of such concurrent resolution.

(C)(i) A motion to discharge in the Senate may be made only by a Member favoring the concurrent resolution, shall be privileged (except that it may not be made after the committee has reported a concurrent resolution with respect to the same final rule of the Commission), and debate on such motion shall be limited to not more than 1 hour, to be divided equally between those favoring and those opposing the motion. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other concurrent resolution with respect to the same final rule of the Commission.

(ii) A motion to discharge in the House may be made by presentation in writing to the Clerk. The motion may be called up only if the motion has been signed by one-fifth of the Members of the House. The motion is highly privileged (except that it may not be made after the committee has reported a concurrent resolution of disapproval with respect to the same rule). Debate on such motion shall be limited to not more than 1 hour, the time to be divided equally between those favoring and those opposing the motion. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(3)(A) When a committee has reported, or has been discharged from further consideration of, a concurrent resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the concurrent resolution. The motion shall be privileged in the Senate and highly privileged in the House of Representatives, and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate on the concurrent resolution shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such concurrent resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the concurrent resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such concurrent resolution was agreed to or disagreed to.

(4) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a concurrent resolution shall be decided without debate.

(5) Notwithstanding any other provision of this subsection, if a House has approved a concurrent resolution with respect to any final rule of the Commission, then it shall not be in order to consider such House any other concurrent resolution with respect to the same final rule.

Promulgation of final rule in accordance with congressional disapproval; submittal to Congress

(c)(1) If a final rule of the Commission is disapproved by the Congress under subsection (a)(2) of this section, then the Commission may promulgate a final rule which relates to the same acts or practices as the final rule disapproved by the Congress in accordance with this subsection. Such final rule—

(A) shall be based upon—

(i) the rulemaking record of the final rule disapproved by the Congress; or

(ii) such rulemaking record and the record established in supplemental rulemaking proceedings conducted by the Commission in accordance with section 553 of Title 5, in any case in which the Commission determines that it is necessary to supplement the existing rulemaking record; and

(B) may contain such changes as the Commission considers necessary or appropriate.

(2) The Commission, after promulgating a final rule under this subsection, shall submit the final rule to the Congress in accordance with subsection (a)(1) of this section.

Effect of congressional inaction on, or rejection of, a concurrent resolution of disapproval

(d) Congressional inaction on, or rejection of, a concurrent resolution of disapproval under this section shall not be construed as an expression of approval of the final rule involved, and shall not be construed to create any presumption of validity with respect to such final rule.

Preparation of report by Comptroller General respecting congressional review of rules; submittal to Congress

(e)(1) The Comptroller General shall prepare a report which examines the review of Commission rules under this section. Such report shall—

(A) list the final rules submitted to the Congress by the Commission during the period in which this section is in effect;

(B) list the final rules disapproved by the Congress under subsection (a)(2) of this section;

(C) specify the number of instances in which the Commission promulgates a final rule in accordance with subsection (c) of this section; and

(D) include an analysis of any impact which the provisions of this section have had upon the decision-making and rulemaking processes of the Commission.

(2) The Comptroller General shall submit the report required in paragraph (1) to the Congress before the end of fiscal year 1982.

Actions in district court of the United States

(f)(1) Any interested party may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this section. The district court immediately shall certify all questions of the constitutionality of this section to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(2) Notwithstanding any other provision of law, any decision on a matter certified under paragraph (1) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought not later than 20 days after the decision of the court of appeals.

(3) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under paragraph (1).

Congressional adjournments

(g)(1) For purposes of this section—

(A) continuity of session is broken only by an adjournment sine die; and

(B) days on which either House is not in session because of an adjournment of more than 5 days to a day certain are excluded in the computation of the periods specified in subsection (a)(2) of this section and subsection (b) of this section.

(2) If an adjournment sine die of the Congress occurs after the Commission has submitted a final rule under subsection (a)(1) of this section, but such adjournment occurs—

(A) before the end of the period specified in subsection (a)(2) of this section; and

(B) before any action necessary to disapprove the final rule is completed under subsection (a)(2) of this section;

then the Commission shall be required to resubmit the final rule involved at the beginning of the next regular session of the Congress. The period specified in subsection (a)(2) of this section shall begin on the date of such resubmission.

Definitions

(h) For purposes of this section:

(1) the term "Commission" means the Federal Trade Commission.

(2) The term "concurrent resolution" means a concurrent resolution the matter after the resolving clause of which is as follows: "That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of ———, which final rule was submitted to the Congress on ———.". (The blank spaces shall be filled appropriately.)

(3) The term "rule" means any rule promulgated by the Commission pursuant to sections 41 to 46 and

47 to 58 of this title, other than any rule promulgated under section 57a(a)(1)(A) of this title.

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Nos. 82-935 and 82-1044

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES SENATE, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

ON APPEALS FROM THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

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QUESTION PRESENTED

The following question was certified to the court of appeals by the district court pursuant to 15 U.S.C. (Supp. V) 57a-l(f)(l):

"Whether Section 2l(a) of the Federal Trade Commission Improvements Act [of 1980], 15 U.S.C. [(Supp. V) 57a-l(a)], and Senate Concurrent Resolution 60, which was approved by the Senate and House of Representatives, (a) violate the principles of separation of powers established in Articles I, II and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power."

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statement 3

Discussion 6

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Buckley v. *Valeo*, 424 U.S. 1 9

Consumer Energy Council of America v. *FERC*, 673 F.2d 425, appeals docketed and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209 .... 5, 6-7, 8

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 9

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 9

Humphrey's Executor v. *United States*, 295 U.S. 602 7

Constitution and statutes:

United States Constitution:

Article I 5, 7

Section 1 1
Section 7 ..... 7, 8
Section 8 7

Article II 5

Article III 5, 6, 8, 9

Page

Constitution and statutes—Continued:

Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 379:

Section 21, 15 U.S.C. (Supp. V) 57a-1 ..... 3, 4, 5, 6, 8, 11

Section 21, 15 U.S.C. (Supp. V) 57a-1(a) 3, 5, 8

Section 21(2), 15 U.S.C. (Supp. V) 57a-1(a)(2) 3

Section 21, 15 U.S.C. (Supp. V) 57a-1(c) 3, 4

Section 21(f), 15 U.S.C. (Supp. V) 57a-1(f) 3

Section 21(f)(1), 15 U.S.C. (Supp. V) 57a-1(f)(1) 6

Section 21(f)(3), 15 U.S.C. (Supp. V) 57a-1(f)(3) 8

Section 21(g), 15 U.S.C. (Supp. V) 57a-1(g) 4

Section 21(i), 94 Stat. 374 4

Pub. L. No. 96-252, 94 Stat. 396 4

Pub. L. No. 97-276, Section 101(a)(3), 96 Stat. 1186 4

Pub. L. No. 97-377, 96 Stat. 1830 ..... 2, 4

Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, 15 U.S.C. 2301 *et seq.* 3

15 U.S.C. 2309(b) 3

15 U.S.C. 41 7

15 U.S.C. 45 2

15 U.S.C. 46(g) 2

Page

Miscellaneous:

128 Cong. Rec. H2882-H2883 (daily ed. May 26, 1981) 4

128 Cong. Rec. H10564 (daily ed. Dec. 20, 1982) 4

128 Cong. Rec. S5402 (daily ed. May 18, 1982) 4

46 Fed. Reg. (1981):

pp. 41328-41378 3

p. 41329 2

p. 41330 2

47 Fed. Reg. 24542 (1982) 4

H.R. Rep. No. 97-586, 97th Cong., 2d Sess. (1982) 2

S. 2956, 97th Cong., 2d Sess. (1982) 4

S. Con. Res. 60, 97th Cong. 2d Sess. (1982) 4

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ON APPEALS FROM THE
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MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Sen. J.S. App. 1a-5a)[1] is not yet reported. The order of the district court certifying the constitutional question to the court of appeals (*id.* at 7a-8a) is reported at 1982-2 Trade Cas. (CCH) para. 64,187. The memorandum order of the district court denying the motion of the United States Senate and House of

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[1] "Sen. J.S." refers to the Jurisdictional Statement filed by the Senate in No. 82-935.

Representatives for relief from the certification order (Sen. J.S. App. 13a-20a) is reported at 1982-2 Trade Cas. (CCH) para. 64,865.

JURISDICTION

The judgment of the court of appeals (Sen. J.S. App. 21a-22a) was entered on October 22, 1982. Notices of appeal were timely filed by the United States Senate and House of Representatives on November 4, 1982 (*id.* at 23a; H.R. J.S. App. 1a),[2] pursuant to 15 U.S.C. (Supp. V) 57a-1(f)(2). The jurisdictional statement in No. 82-935 was filed on December 6, 1982, and the jurisdictional statement in No. 82-1044 was filed on December 20, 1982. The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1252 and Section 21(f)(2) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. (Supp. V) 57a-1(f)(2), as extended by Pub. L. No. 97-377 96 Stat. 1830. See note 4, *infra*.

STATEMENT

1.a The Used Car Rule that was promulgated by the Federal Trade Commission in 1981 and is at issue in this case arose out of an investigation conducted in 1973 by one of the Commission's regional offices. See 46 Fed. Reg. 41329 (1981).[3] This investigation resulted in a recommendation that the Commission, pursuant to its authority to make rules regarding deceptive acts or practices in commerce (15 U.S.C. (& Supp. V) 45 and 46(g)), issue a rule to prevent certain deceptive practices in the sale of used cars.

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[2]"H.R. J.S." refers to the Jurisdictional Statement filed by the House of Representatives in No. 82-1044.

[3]The history of the used car rulemaking proceeding is set out in detail in 46 Fed. Reg. 41329-41330 (1981), published when the Commission issued its final rule, and in H.R. Rep. No. 97-586, 97th Cong., 2d Sess. (1982).

In 1975, while the rulemaking proceeding was in progress, the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act became effective. 15 U.S.C. 2301 *et seq.* That Act specifically directed the Commission to initiate a rulemaking proceeding dealing with "warranties and warranty practices in connection with the sale of used motor vehicles." 15 U.S.C. 2309(b). On August 14, 1981, the Commision published its final rule concerning representations of warranty coverage and disclosures of accurate information in connection with the sale of used cars. See 46 Fed. Reg. 41328-41378. The rule requires dealers to post a window sticker on used cars offered for sale to consumers describing: (1) certain major mechanical defects known to the dealer; (2) whether the dealer offers any warranties on the car; and (3) the nature of such warranties.

b. While the used car rulemaking proceeding was still pending, Congress enacted the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374. Section 21(a) of that Act required the Commission to submit all final trade regulation rules to Congress. See 15 U.S.C. (Supp. V) 57a-1(a). Any such rule would become effective unless within 90 days of continuous session the Senate and House of Representatives "adopt[ed] a concurrent resolution disapproving such final rule." 15 U.S.C. (Supp. V) 57a-1(a)(2). If a rule were disapproved, the Commission could promulgate a revised final rule based on the earlier record and any necessary supplementation, and this revision was to be submitted to Congress before becoming effective. 15 U.S.C. (Supp. V) 57a-1(c).

The Act also provided a special mechanism for the prompt resolution of any constitutional challenge to the provision for congressional disapproval of rules. See 15 U.S.C. (Supp. V) 57a-1(f). Under this mechanism, if an action is filed in a United States district court to "construe the constitutionality of" the legislative veto provision, the

district court is required to certify all questions of constitutionality immediately to the appropriate court of appeals, which shall hear the matter sitting en banc.[4]

Consistent with the requirements of Section 21 of the 1980 Act, the Commission submitted its final Used Car Rule to each House of Congress on September 9, 1981.[5] On May 18, 1982, the Senate passed Senate Concurrent Resolution 60, disapproving the Rule. 128 Cong. Rec. S5402 (daily ed. May 18, 1982).[6] The House of Representatives passed the resolution on May 26, 1982. 128 Cong. Rec. H2882-H2883 (daily ed. May 26, 1982). In view of the legislative veto of the Rule, the Federal Trade Commission issued a statement indicating that it was taking the matter under advisement pursuant to Section 21(c) of the 1980 Act, which, as stated above, provides for possible revision and resubmission of the Rule to Congress. See 47 Fed. Reg. 24542 (1982).

2. Following the legislative veto of the Rule, appellees Consumers Union of the United States, Inc., and Public Citizen, Inc., filed this action in the United States District

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[4]Section 21 of the 1980 Act was to lapse on September 30, 1982. See Section 21(i) of the (1980) Act, 94 Stat. 396. However, Section 101(a)(3) of Pub. L. No. 97-276, 96 Stat. 1186, by incorporating the substance of S. 2956 (97th Cong., 2d Sess.), which was reported to the Senate on September 24, 1982, temporarily continued Section 21 in effect. Section 21 was further extended through September 30, 1983 by Pub. L. No. 97-377, 96 Stat. 1830. See 128 Cong. Rec. H10564 (daily ed. Dec. 20, 1982).

[5]Because of the technicalities of the continuous session requirement (see 15 U.S.C. (Supp. V) 57a-1(g)), the rule was resubmitted to Congress on January 28, 1982 (Sen. J.S. App. 2a n.3).

[6]The resolution provided in full: "*Resolved by the Senate (the House of Representatives concurring)*, That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of the trade regulation rule relating to the sale of used motor vehicles, which final rule was submitted to the Congress on January 28, 1982" (Sen. J.S. App. 24a).

Court for the District of Columbia on June 2, 1982. The Federal Trade Commission, the United States Senate, and the House of Representatives were named as defendants. The plaintiffs alleged that their members would be directly harmed by the legislative veto and the consequent failure of the Commission to make the Used Car Rule effective (H.R. J.S. App. 4a-5a). They sought a declaratory judgment that the legislative veto provisions of the Federal Trade Commission Improvements Act, as well as the veto resolution itself, are unconstitutional. In addition, they sought an order requiring the Commission to implement its final Used Car Rule (*id.* at 7a-8a).

On June 29, 1982, the district court certified the constitutional question to the court of appeals (Sen. J.S. App. 7a-8a). On July 23, 1982, the district court denied a motion filed by the Senate and the House of Representatives for relief from this order, concluding that there were no factual issues to be resolved by the district court in order to facilitate the court of appeals' resolution of the constitutional question certified to it (*id.* at 13a-20a).

3. On consideration of the certified question, the court of appeals, sitting en banc, unanimously held[7] that the legislative veto provisions of Section 21(a) of the Federal Trade Commission Improvements Act and Senate Concurrent Resolution 60 passed pursuant to that Section "violate the principles of separation of powers established in Articles I, II and III of the Constitution" and "violate the procedures established by Article I for the exercise of legislative powers" (Sen. J.S. App. 4a). In so holding, the court adopted the reasoning of the panel of that court in *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982), appeals docketed and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209,

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[7]Judges Wald, Mikva and Scalia did not participate.

which, the en banc court noted, had "thoroughly considered and disposed of" the constitutional issues (Sen. J.S. App. 4a).[8]

The court of appeals also concluded as a threshold matter that the plaintiffs had standing to bring the constitutional challenge. The court observed that it was undisputed that Congress, in expressly authorizing "[a]ny interested party" to file an action challenging the statute's legislative veto provisions (15 U.S.C. (Supp. V) 57a-l(f)(l)), intended to permit standing to seek judicial review to the full extent permitted by Article III of the Constitution (Sen. J.S. App. 2a). The court of appeals observed that both Consumers Union and Public Citizen "speak on behalf of consumers, in this instance, used car purchasers, who seek disclosures that would assist them in making informed purchasing decisions," and that "but for the veto's intervention, the FTC's used car rule would have secured significant assistance and protection for the used car buyers they represent" (*id.* at 2a-3a). This injury, the court concluded, satisfies Article III standing requirements.

The court of appeals similarly held that the present case satisfies the adverseness requirements of Article III, noting that "[t]he House and Senate, as named defendants, have vigorously aired their position on the constitutionality of the congressional veto, and have not sought dismissal of the complaint against them" (Sen. J.S. App. 3a).

DISCUSSION

The en banc court of appeals, adopting the reasoning of the panel of that court in *Consumer Energy Council of*

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[8]In view of its conclusion on the other aspects of the certified question, the court of appeals declined to express an opinion as to whether Section 21(a) of the Act and Senate Concurrent Resolution 60 improperly delegated administrative power to Congress without any standards for the exercise of that power (Sen. J.S. App. 5a).

America v. *FERC*, unanimously held that the legislative veto provision of the Federal Trade Commission Improvements Act and the concurrent resolution of disapproval passed pursuant to that provision are inconsistent with the procedures in Article I of the Constitution for the exercise of legislative powers and violate the principles of separation of powers established by Articles I, II and III of the Constitution.

The constitutionality of the legislative veto device is an issue that plainly warrants resolution by this Court. However, the Court heard reargument on December 7, 1982, in *INS* v. *Chadha*, Nos. 80-1832, 80-2170 and 80-2171, which also presents this issue. In the briefs on behalf of the Immigration and Naturalization Service in *Chadha*, we have argued that the legislative veto device is unconstitutional for essentially the same reasons given by the District of Columbia Circuit in *Consumer Energy Council of America* v. *FERC*, and adopted by the en banc court in this case. Accordingly, we suggest that these appeals be held pending a decision by this Court in *Chadha*.

As we have explained more fully in the Memorandum for the United States in *Consumer Energy Council of America* (at 12-18), the Constitution furnishes no basis for distinguishing this case from *Chadha* on the grounds that it involves a legislative veto of a rule rather than an order entered at the conclusion of an adjudicatory proceeding and that the Officers of the United States responsible for promulgating the rule may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 15 U.S.C. 41; see *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Nor does the fact that this case involves a statute authorizing a two-House legislative veto, and therefore does not violate the bicameralism requirement of Article I, Sections 1, 7 and 8 of the Constitution, distinguish it

from *Chadha* and *Consumer Energy Council of America* for purposes of constitutional analysis. Section 21(a) of the Federal Trade Commission Improvements Act does not provide for a resolution of disapproval to be presented to the President, as required by Article I, Section 7 of the Constitution, and it violates the principles of separation of powers by directly involving the Legislative Branch in the execution of the laws. These are independent grounds for invalidation of the legislative veto device. Sen. J.S. App. 4a; *Consumer Energy Council of America* v. *FERC, supra,* 673 F.2d at 461-477.[9]

2. The House of Representatives, but not the Senate, has raised two issues in addition to the constitutionality of the legislative veto provision in 15 U.S.C. (Supp. V) 57a-1(a): (i) whether appellees Consumers Union and Public Citizen have standing to bring this suit, and (ii) whether there is an absence of "adverseness" in the case that deprives the courts of jurisdiction under Article III of the Constitution. See H.R. J.S. 8-12. These questions are insubstantial, and the unanimous en banc court of appeals correctly rejected the House of Representatives' contention as to each.

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[9]Paragraph (3) of the judicial review provision of Section 21 of the Federal Trade Commission Improvements Act provides that "[i]t shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under paragraph (1)." 15 U.S.C. (Supp. V) 57a-1(f)(3). The Court already has received full briefing and has twice heard argument on the constitutionality of the legislative veto in *Chadha*. Because the decision in *Chadha* may dispose of the constitutional questions presented in this case, holding the instant appeals pending the decision in *Chadha* is, in our view, fully consistent with the congressional purpose underlying 15 U.S.C. (Supp. V) 57a-1(f)(3) of obtaining a prompt ruling by this Court on the constitutionality of the legislative veto device. The Senate has expressly refrained from moving that its appeal be expedited, because it recognizes that the Court's disposition of *Chadha* "may affect future proceedings in this appeal" (Sen. J.S. 9 n.7). The House of Representatives likewise has not moved to expedite its appeal.

a. The court of appeals noted that it was "undisputed" in this case that Congress, by granting a right to "[a]ny interested party" to challenge the constitutionality of the legislative veto device, intended to permit standing to seek judicial review to the full extent permitted by Article III. Sen. J.S. App. 2a; compare *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979). The House of Representatives does not contend otherwise. See J.S. 11.

As the court of appeals found, appellees Consumers Union and Public Citizen speak on behalf of used car purchasers who seek disclosures that would assist them in making informed decisions,[10] and they alleged that but for the legislative veto, the Federal Trade Commission's Used Car Rule would have provided significant assistance and protection for the used car buyers they represent (Sen. J.S. App. 3a). The court of appeals correctly concluded that this injury to the organizations' members satisfies Article III standing requirements. See also *Buckley* v. *Valeo*, 424 U.S. 1, 11-12 (1976). This Court recently held that the injury sustained as a result of the inability to obtain accurate information in the manner required by statute satisfies Article III standing requirements. *Havens Realty Corp.* v. *Coleman, supra*, 455 U.S. at 373-374. It follows from *Havens Realty* that the injury sustained by the members and employees of Consumers Union and Public Citizen as a result of the legislative veto of a rule that would have provided for the furnishing of information likewise satisfies Article III standing requirements.

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[10]See H.R. J.S. App. 4a-5a (allegations in complaint concerning injury to members); Sen. J.S. App. 11a-12a (stipulation between plaintiffs and Federal Trade Commission concerning facts as to standing).

b. The House of Representatives also errs in contending (J.S. 8-10) that this case lacks the "adverseness" required by Article III of the Constitution. The Federal Trade Commission did not place the Used Car Rule into effect because of the legislative veto of that Rule. The Commission's failure to do so injured the consumers that Consumers Union and Public Citizen represent, and this injury would be redressed if the district court on remand ordered the Commission to make effective and implement the Rule—the relief sought in the complaint (H.R. J.S. App. 8a)—or remanded to the Commission for further consideration without regard to the legislative veto. As we explain in our Reply Brief to the Motions to Dismiss the INS's appeal in *Chadha* (at 11-14)[11] and in the principal brief on the merits in *Chadha* (at 73-74),[12] the agency's refusal to grant the relief requested furnishes the necessary adverseness for Article III purposes, irrespective of whether the agency and the private party or parties agree on the merits of the underlying constitutional question.[13] Thus, the House of Representatives' argument would be without merit even if the Senate and House of Representatives were not parties in this case.

The Senate and House of Representatives are parties, however, and they have actively defended the validity of the legislative veto. The House of Representatives contends (J.S. 9 & n.6) that it was not amenable to suit. But even if the House is correct on this point, the Senate does not assert an

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[11]1981 Term, No. 80-1832.

[12]1981 Term, Nos. 80-1832, 80-2170 and 80-2171.

[13]The Federal Trade Commission has declined to place the Used Car Rule into effect pending a final judicial resolution of the constitutionality of the legislative veto of that Rule and has deferred to the Attorney General for the presentation of legal argument regarding the constitutionality of Section 21(a) of the Federal Trade Commission Improvements Act.

immunity defense in this Court. As the court of appeals observed (Sen. J.S. App. 3a-4a), a Senate resolution authorized the Senate Legal Counsel to defend the Senate in this case. Moreover, the Senate concedes (J.S. 5 n.6) that it did not move to be dismissed from the case and that it presented a defense of the statute on the merits, and the Senate now urges (J.S. 7,9) the Court to reach and decide the question of the constitutionality of the legislative veto. Thus, whatever the proper resolution of the House of Representatives' immunity point, the Senate's current posture plainly lends an additional adversariness to the proceedings.

CONCLUSION

The appeals should be held pending the Court's decision in *INS* v. *Chadha* and disposed of in light of that decision.

Respectfully submitted

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Solicitor General

JANUARY 1983

DOJ-1983-01